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84-1140

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. -

Nick Melia,

Petitioner.

v.

United States of America,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Submitted by:

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QUESTIONS PRESENTED

I. Whether 18 U.S.C. §3237(a), which provides for the venue of "continuing" offenses, can constitutionally be construed to allow a defendant to be tried for receiving stolen goods in a district through which the stolen goods passed prior to the defendant's actual or constructive receipt, knowledge or involvement with the goods.

II. Whether, as a matter of statutory construction, 18 U.S.C. §3237(a) permits a defendant to be tried for receiving stolen goods in a district through which the stolen goods passed prior to the defendant's actual or constructive receipt, knowledge or involvement with the goods.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

NO.

NICK MELIA,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner Nick Melia prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit rendered on August 15, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 741 F.2d 70 (1984) and is attached as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was rendered on August 15, 1984, and petitioner's Petition for Rehearing and Suggestion for Rehearing In Banc was denied on October 5, 1984. (A copy of the order denying said Petition is attached as Appendix B). The Jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

Article Three, Section 2, cl. 3 of the Constitution of the United States provides, as follows:

> The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The Sixth Amendment of the Constitution of the United States provides, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law....

This case involves the interpretation of two sections of the United States Code, 18 U.S.C. §2315 and 18 U.S.C. §3237(a). 18 U.S.C. §2315 provides, in pertinent part, as follows:

> Whoever receives, conceals, stores, barters, sells or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or
>
> pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken... Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. §3237(a) provides as follows:

> (a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be

inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

STATEMENT OF THE CASE

Petitioner Melia was tried in the Eastern District of North Carolina for receiving and assisting in the sale of stolen property in Connecticut, in violation of 18 U.S.C. §2315. Although the Government's evidence established that the property had been stolen in Wilmington, North Carolina, there was no evidence that Melia had participated in any way in the theft, had any knowledge of the theft or was in any way involved -- actually or constructively -- in any conduct or movement of the goods in North Carolina. All of Melia's alleged activities took place in the State of Connecticut and occurred after the property had been removed from North Carolina to Ohio.

At the conclusion of the Government's case and again at the end of all of the evidence, Melia moved for a judgment of acquittal on the ground that the Government had failed to prove venue in North Carolina. The denial of these motions formed the sole basis for petitioner's appeal.[1]

The Court of Appeals ruled on the appeal without oral argument. In denying Melia's challenge to venue, the Court of Appeals held that receipt of stolen goods is a "continuous" offense

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1. The trial court did not rule on the merits of Melia's legal argument that venue was improper. Rather the trial court apparently felt that Melia had waived his right to challenge venue and denied Melia's motions solely on that basis. The Court of Appeals held that Melia had not waived the issue of venue, but affirmed Melia's conviction on the ground that venue was proper in North Carolina.

and can be prosecuted, under 18 U.S.C. §3237(a), in any state in which the stolen goods moved -- before or after the offender's involvement with the goods, participation in their interstate movement or knowledge of their movement. The Court of Appeals rejected petitioner's argument that such a construction of §3237(a) rendered the statute unconstitutional; the Court of Appeals held that Melia could properly be tried in North Carolina because the goods that he received had originated in North Carolina even though Melia committed no offense in North Carolina and was in no way involved --actually or constructively -- in the movement of the goods in that district. Melia's petition for rehearing and suggestion for

rehearing in banc was denied on October 5, 1984.

REASONS FOR GRANTING THE WRIT

The decision below is so offensive to the venue provisions of the United States Constitution, and so contrary to precedent, that a response from this Court, in the form of summary reversal or reversal after review on a writ of certiorari, is required. The Court of Appeals' decision effectively erases all limitations on venue from the Constitution. The court's holding is in direct conflict with decisions in at least three other circuits, is unsupported by any other case, and vitiates the constitutional limitations on venue established by this Court.

A. The Decision of the Court of Appeals Renders 18 U.S.C. §3237(a) Unconstitutional.

The basic constitutional principle of venue is that a criminal defendant has the right to be tried in the vicinage where his criminal conduct occurred. United States v. Johnson, 323 U.S. 273, 275 (1944). When a defendant becomes involved in an ongoing process of criminal wrongdoing or initiates a process of wrongdoing that extends over more than one district, his offense is a "continuing" offense. This Court has held that venue for prosecution of "continuing" offenses is limited by the Constitution to those districts "through which [a] force propelled by an offender operates." United States v. Johnson, supra, 323 U.S. at 275 (emphasis added).

Thus, the core constitutional limitation on venue for a continuing offense is that a defendant can be tried only in those districts through which his criminal conduct extended or through which his criminal conduct caused the goods or instrumentalities associated with the offense to pass.

Any determination of the constitutionally permissible sites for venue must thus proceed from an inquiry into where the crime alleged was committed. United States v. Cores, 364 U.S. 405, 407 (1958); United States v. Anderson, 328 U.S. 699, 703 (1945); United States v. Johnson, supra, 323 U.S. at 275. The situs of the offense is to be determined by reference to the nature of the crime alleged and the location of the act or acts constituting it. Id.

The specific offense for which defendant Melia was charged --the receipt and disposition of stolen goods -- by its nature, commences only upon the defendant's constructive or actual receipt of the stolen goods. See, e.g., United States v. Bozza, 365 F.2d 206, 220-21 (2d Cir. 1966). At least three circuits have thus expressly held that venue for such an offense can lie only in those districts where the stolen goods are received by the offender or are moved by him. United States v. DeKunchak, 467 F.2d 432, 438 (2d Cir. 1972); United States v. Bozza, supra, 365 F.2d at 220-21; United States v. Black Cloud, 590 F.2d 270 (8th Cir. 1979); United States v. Wolf, 535 F.2d 476, 478 (8th Cir. 1976); United States

v. Hopkins, 529 F.2d 775, 777 (8th Cir. 1976); Jenkins v. United States, 392 F.2d 303, 305-06 (10th Cir. 1968).

Since the act of receiving does not commence until the goods are actually received or the defendant engages in conduct directed toward the receipt of the goods, any movement of the goods prior to the defendant's constructive or actual involvement is not a constitutionally valid basis for venue. Thus, the courts of appeals have properly held that a defendant may constitutionally be prosecuted in any district in which he travels once the goods are received, but may not be prosecuted in districts through which the stolen goods passed prior to his receipt of them. See Jenkins v. United States, supra,

392 F.2d at 305; United States v. DeKunchak, supra, 467 F.2d at 437-39; United States v. Wolf, supra, 535 F.2d at 478.

The Fourth Circuit's decision stands alone in construing §3237(a) of Title 18, which governs venue for "continuing" offenses, to confer venue in "receiving" cases in any district from, into or through which stolen goods have been transported or removed at any time --irrespective of a defendant's lack of (actual or constructive) participation in such movement.[2] Petitioner

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2. The language of 18 U.S.C. §3237(a) relied upon by the Court of Appeals reads as follows:

> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a con-

respectfully submits that this construction renders the statute unconstitutional.

In United States v. Johnson, supra, 323 U.S. 273, this Court held that Congress could constitutionally utilize the notion of a "continuing offense" to "provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates." Id. at 275. Johnson did not state that Congress could extend venue to all localities through which a stolen good moves prior

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(fn. 2, cont.) tinuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

to a defendant's involvement in an offense relating to that good. Rather, the crucial language in Johnson refers to the "force propelled by an offender," and provides only that Congress can define the situs of an offense to include all localities through which an item is propelled as a direct result of the offender's illegal actions. As this Court explained in United States v. Cores, supra, 356 U.S. at 408, where Congress has "created a continuing offense, it is held, for venue purposes, to have been committed wherever the wrongdoer roamed." Accord, United States v. DeKunchak, supra, 467 F.2d at 437-38.

The Fourth Circuit's misunderstanding of this critical limitation on

venue for continuing offenses goes to the heart of two constitutional provisions of fundamental importance both historically and in modern times. The constitutional limitations on venue reflect the Framers' fundamental intention to safeguard the common law right to a trial by jury drawn from the vicinage. Colonial protest over the Crown's continuing disregard for this well-established aspect of the English right to trial by jury had been vehement. In particular, the Crown's attempts in the 1770's to transport colonists to England for trial on purported colonial offenses had outraged the American populace. See, e.g., Virginia Resolves of May 16, 1769, Journals of the House of Burgesses of

Virginia, 1766-1769 at 214 (Kennedy ed. 1906). The First Continental Congress expressly condemned the legislation upholding such deportations as depriving "the American citizen of a constitutional trial by jury of the vicinage," a right described as "the great and inestimable privilege of being tried by their peers of the vicinage" guaranteed under English common law. Commager, Documents of American History, 83-84 (2d ed. 1940). In October 1774, the Continental Congress reaffirmed this aspect of the "great right" in its address to the Province of Quebec. 1 Journals of the Continental Congress 107 (1904). These continuing protests ultimately resulted in language in the Declaration of Independence condemning the King "for

transporting us beyond Seas to be tried for pretended offenses."

Thus, just as the Fourth Amendment was adopted in response to colonial outrage with the King's invasion of the colonists' privacy, so "it must not be forgotten that the sixth amendment was adopted in the wake of a recent history of forced deportations to distant places for trial." Comment, "Multi-Venue and the Obscenity Statutes," 115 U.Penn.L.Rev. 399, 413 (1967).

The hardships and unfairness that prompted the historical development of these venue safeguards are applicable in modern times. This Court has repeatedly stated that "[q]uestions of venue in criminal cases ... raise deep issues of public policy in the light of which

legislation must be construed." United States v. Johnson, supra, 323 U.S. at 276. See Travis v. United States, 364 U.S. 631, 634 (1961); United States v. Cores, supra, 356 U.S. at 407. The venue provisions of the Constitution "were designed for the benefit of the accused in criminal trials," United States v. Walden, 464 F.2d 1015, 1017 (4th Cir. 1973), and provide "a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place." United States v. Cores, supra, 356 U.S. at 407. Accord, United States v. Johnson, supra, 323 U.S. at 275. Moreover, leeway in the choice of venue "leads to the appearance of abuses, if not to abuses, in the selection of what may be

deemed a tribunal favorable to the prosecution." United States v. Johnson, supra, 323 U.S. at 275. Accord, Travis v. United States, supra, 364 U.S. at 634.

Because of the importance of the public policy considerations underlying the constitutional limitations on venue, this Court has instructed that venue acts should be construed narrowly and "given that construction which will respect such considerations." United States v. Cores, supra, 356 U.S. at 407; accord, United States v. Johnson, supra, 323 U.S. at 276. Indeed, because these public policy considerations remain so fundamental, this Court has held that "[i]f an enactment of Congress equally permits the underlying spirit of

the constitutional concern for trial in the vicinage to be respected, construction should go in the direction of constitutional policy even though not commanded by it." United States v. Johnson, supra, 323 U.S. at 276; accord, United States v. Cores, supra, 356 U.S. at 407.

No court has, to petitioner's knowledge, held that venue may constitutionally lie in districts where stolen goods moved without the actual or constructive involvement of the defendant. The Court of Appeals' decision violates fundamental constitutional limitations on venue and should be reviewed and reversed.

B. The Court of Appeals' Construction of 18 U.S.C. §3237(a) is Unprecedented, in Conflict with the Other Courts of Appeals, and Inconsistent with the Legislative History.

Although the construction given to §3237(a) by the Fourth Circuit renders the statute unconstitutional, the error stems from improper statutory construction and not from congressional overreaching. The sole reason given by the Court of Appeals for its expansive construction of §3237(a) was its belief that such venue would have been proper under §418 of Title 18 of the 1940 Edition of the United States Code, the predecessor to Section 3237(a).[3]

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3. Title 18 U.S.C. §418 of the 1940 Code provided venue (in a §416 [receipt or disposal of goods] prosecution) "in any district from, into or through which such goods ... have been transported or removed."

However, the Court of Appeals clearly misunderstood the legislative history of the act.

Section 3237(a) of Title 18 was enacted to exploit, but not exceed, the constitutional parameters for venue established in United States v. Johnson, supra, 323 U.S. 273. See Reviser's Note to 18 U.S.C. §3237. The discussion of the legislative history and scope of §3237(a) in United States v. DeKunchak, supra, 467 F.2d 432, upon which the Court of Appeals relied, makes clear that venue for receiving and disposing of stolen property will only lie under §3237(a) in a district where a defendant received or disposed of the stolen goods unless he has caused the transportation of the goods through another district.

Id. at 437-38. See also United States v. Bozza, supra, 365 F.2d at 220-21. Indeed, the Government expressly conceded this aspect of the DeKunchak holding in its brief to the Court of Appeals. Government Brief at 10-11 n. 9. Accord, United States v. Bozza, supra; United States v. Black Cloud, supra; United States v. Wolf, supra; United States v. Hopkins, supra; Jenkins v. United States, supra.

Petitioner has found no precedent to support the Court of Appeals' holding -- under either §3237(a) or the 1940 Code. Indeed, no such precedent could exist. Since United States v. Johnson, only the Fourth Circuit Court of Appeals has departed from the constitutional limitations on venue established by this

Court in Johnson. Thus, the receiving cases in other circuits specifically preclude grounding venue on the fact that goods were stolen in one district and transported by others to another district prior to and independent of their receipt by the defendant. See, e.g., Jenkins v. United States, supra; United States v. Bozza, supra. These cases specifically hold that receipt of stolen goods is not a continuous offense. Only where the offender causes interstate transportation of stolen goods after their receipt is there a continuous offense and multi-district venue. See United States v. DeKunchak, supra.

C. The Decision of the Court of Appeals Calls for Summary Reversal by this Court.

If left standing, the unprecedented construction given to 18 U.S.C. §3237(a) by the Court of Appeals would render the statute unconstitutional and produce incongruous results.

Under such a construction, if goods were stolen in California and transported across the country without any knowledge or involvement of a potential receiver in New York, the New York offender could be prosecuted in any of the states across the continent through which the goods travelled. Most significantly, such a construction would apply to all of the federal offenses relying on interstate transportation or use of the mails as a basis for federal

jurisdiction. In effect, for the large number of such federal offenses, limitations on venue would be practically non-existent.[4]

These results would clearly violate the venue provisions of Article III and the Sixth Amendment, as well as the policy considerations underlying

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4. Under the Court of Appeals' decision, if an automobile were stolen in California and driven through New Mexico to a receiver in Texas who then drove the car to another receiver in New Jersey who subsequently delivered the automobile to another receiver in Connecticut, the receiver in Connecticut could be prosecuted in New Mexico. Similarly, under the decision, if stolen property were sent through the mails from California to a receiver in Texas and then again to numerous subsequent receivers throughout the country, any of the receivers could be prosecuted in any state from, through or to which the goods were mailed.

those provisions.[5]

The Court of Appeals has established an unprecedented and unconstitutional rule of law under which a defendant can be tried without proof that he was actually or constructively involved in wrongdoing in the vicinage. In this case, the Government did not offer evidence or prove that Melia in any way exercised any actual or constructive control or otherwise received the stolen jewelry prior to its arrival in the State of Connecticut. The

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5. These "fundamental guarantees have been implemented by Federal Rule of Criminal Procedure 18 which provides that '[e]xcept as otherwise permitted by statute or these rules, the prosecution shall be had in a district in which the offense was committed.'" United States v. Billups, 692 F.2d 320, 332 (4th Cir. 1982).

affirmance of Melia's conviction deprived him of his constitutional right to trial in the vicinage and established a rule of law that is inconsistent with every other pronouncement on the issue made by this Court or any court of appeals. The decision below, therefore, requires summary reversal or reversal after review on writ of certiorari.

CONCLUSION

For the foregoing reasons, petitioner prays that his Petition for a Writ of Certiorari be granted, or, in the alternative that this Court summarily reverse the decision of the Court of Appeals.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATION

This is to certify that three copies of the foregoing Petition for a Writ of Certiorari were mailed, postage pre-paid, to the Solicitor General, Department of Justice, Washington, D.C. 20530 and to Louis M. Fisher, Appellate Session, Criminal Division, United States Department of Justice, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044-0899 this 4th day of December, 1984.

/s/
DAVID S. GOLUB

APPENDICES

UNITED STATES OF AMERICA, Appellee,

v.

NICK MELIA, Appellant.

NO. 83-5055

United States Court of Appeals,

Fourth Circuit.

Submitted Nov. 1, 1983.

Decided Aug. 15, 1984.

After remand, 655 F.2d 547, defendant was convicted in the United States District Court for the Eastern District of North Carolina, W. Earl Britt, Chief Judge, of knowingly receiving stolen property in interstate commerce, and he appealed. The Court of Appeals, 691 F.2d 672 reversed and remanded. On remand, defendant was again convicted, and defendant appealed. The Court of Appeals held that venue was proper in North Carolina.

Affirmed.

David S. Golub, Leora Herrmann, Silver, Golub and Sandak, Stamford, Conn., on brief, for appellant.

Samuel T. Currin, U.S. Atty., Raleigh, N.C., Louis M. Fischer, Atty., Dept. of Justice, Washington, D.C., on brief, for appellee.

Before MURNAGHAN and SPROUSE, Circuit Judges, and Butzner, Senior Circuit Judge.

PER CURIAM:

Nick Melia, convicted of receiving, concealing, and selling stolen jewelry that had moved in interstate commerce in violation of 18 U.S.C. §2315,[1] appeals the district court's

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1. The pertinent part of 18 U.S.C. §2315 provides:

> Whoever receives, conceals, ... sells, or disposes of any goods... of the value of $5,000.00 or more

> ... moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen [shall be punished].

judgment on the ground of improper venue. We affirm because prosecution in North Carolina was authorized by 18 U.S.C. §3237(a).

The record discloses that thieves stole the jewelry, valued at $600,000.00, in North Carolina and transported it to Ohio and thence to Melia's home in Connecticut. Melia, a fence, knowing that the jewelry was stolen, received, concealed, and sold it in Connecticut. At the conclusion of the government's case, Melia moved for acquittal on the ground of improper venue. The district court denied the

motion, holding that Melia had waived the right to challenge venue by not raising the objection before trial.[2]

[1] We hesitate to affirm on the ground of waiver. The rule that the objection must be made before trial applies only when the defect is apparent on the face of the Indictment. See 2 C. Wright, Federal Practice & Procedure §306, at 221-22 (1982). Otherwise, the objection can be made at the close of

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2. This case is before us for the third time. See United States v. Chinchic, 655 F.2d 547 (4th Cir. 1981) (reversed and remanded for a new trial because of improper joinder with defendants who had committed a different burglary); United States v. Melia, 691 F.2d 672 (4th Cir. 1982) (reversed and remanded for a new trial because of the admission of prejudicial evidence).

all the evidence. United States v. Black Cloud, 590 F.2d 270, 272 (8th Cir. 1979). There was no defective allegation of venue in Melia's indictment.

As an alternative ground for upholding venue in North Carolina, the government asserts that venue for the prosecution of a violation of §2315 is governed by 18 U.S.C. §3237(a), which deals with offenses begun in one district and completed in another.[3]

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3. 18 U.S.C. §3237(a) provides:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

The legislative history supports the government's position. Section 2315, enacted as a part of a 1948 recodification, is derived almost verbatim from §416 of title 18 of the 1940 edition of the United States Code.

Section 418 of the 1940 Code provides that any person violating §416 may

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(fn. 3, cont.) Any offense involving the use of the mails or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commercce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress may be inquired or and prosecuted in any district from, through or into which such commerce or mail matter moves.

be tried "in any district from, into, or through which such goods ... have been transported or removed." Consequently, it is clear that under the 1940 Code the government could have prosecuted Melia in North Carolina.

In the recodification of 1948, Congress eliminated §418 and enacted §3237. The recodification of 1948 and the enactment of §3237 were not intended to change the law pertaining to venue of a prosecution for the receipt, concealment, and disposition of stolen goods transported in interstate commerce. The House report on the recodification explained: "Section 418 of title 18 U.S.C., 1940 ed., relating to venue, was omitted as completely covered by section 3237 of this title." H.R. Rep. No. 304,

80th Cong., 1st Sess. A146 (1947). The legislative history is also reviewed, albeit in a different context, in United States v. Hankish, 502 F.2d 71, 73-76 (4th Cir. 1974), and United States v. DeKunchak, 467 F.2d 432, 437-38 (2d Cir. 1972).

In answer to the government's position, Melia insists that the receipt of stolen goods is a single act and the crime must be prosecuted where the receipt occurs unless the proof establishes that the defendant participated in removal of the goods from the district where the theft occured. He relies on United States v. Black Cloud, 590 F.2d 270 (8th Cir. 1979); Jenkins v. United States, 392 F.2d 303, 305-06 (10th Cir. 1968); and United States v.

Bozza, 365 F.2d 206, 220-21 (2d Cir. 1966).

These cases do not require reversal of Melia's conviction. neither Jenkins nor Black Cloud dealt with the relationship between §§4315 and 3237(a). In neither case did the government rely on §3237(a). Bozza did consider §3237(a) in determining vanue for the prosecution of theft of stamps stolen from post offices and their transportation in interstate commerce. The court, however, did not advert to the legislative history, which explains, as noted above, the application of §3237(a) to the prosecution under §231.

Melia also argues that he had a constitutional right to be tried only in Connecticut, where he received the

goods. He relies on Article III, which guarantees trial in the state where the crime was committed, and the sixth amendment, which provides for a jury from the state in which the crime was committed.

[2, 3] Melia's constitutional argument lacks merit. Congress may constitutionally enact a statute for venue "in any crimnal court of the United States through which a process of wrongdoing moves." United States v. Johnson, 323 U.S. 273, 276, 65 S.Ct. 249, 251, 89 L.Ed. 236 (1944). To convict Melia of violating §2315, the government, through a North Carolina witness, proved the theft in that State. It also traced the jewelry through Ohio and into Connecticut, where Melia,

knowing it had been stolen, received and sold it. In the meantime, he participated in the concealment that the thieves had initiated in North Carolina. Section 3237(a) was enacted, as we have shown, to deal precisely with this interstate "process of wrongdoing." As Johnson, explains, application of this statute to the facts of this case is not prohibited by the Constitution. See also Armour Packing Co. v. United States, 209 U.S. 56, 77, 28 S.Ct. 428, 433, 52 L.Ed. 681 (1908).

Because the facts and legal arguments are adequately presented in the briefs and record, we dispense with oral argument. The judgment of the district court is affirmed.

APPENDIX B:

ORDER OF THE FOURTH CIRCUIT COURT OF APPEALS DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-5055

United States of America,

Appellee,

versus

Nick Melia,

Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. W. Earl Britt, District Judge.

The appellant's motion for leave to file petition for rehearing and suggestion for rehearing in banc out of time, and his petition for rehearing and suggestion for rehearing in banc were submitted to the court.

Inasmuch as the panel considered the motion for leave to file the petition out of time and is of the opinion that it should be granted, and

Inasmuch as no member of the court requested a poll on the suggestion for rehearing in banc, and

Inasmuch as the panel considered the petition for rehearing, and is of the opinion that it should be denied,

IT IS ORDERED that the motion for leave to file the petition for rehearing out of time is granted.

IT IS FURTHER ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner with the concurrence of Judge Murnaghan and Judge Sprouse.

FOR THE COURT,

JOHN M. GREACEN

CLERK

No. 84-1140

FILED
MAY 13 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

NICK MELIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner waived his venue claim by failing to assert it prior to the close of the government's case-in-chief at his fourth trial on the same charge.

2. Whether the venue provision in the second paragraph of 18 U.S.C. 3237(a) allows prosecution of a defendant for receipt of stolen goods that have travelled in interstate commerce, in violation of 18 U.S.C. 2315, in a district other than the one in which he received the stolen goods.

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In the Supreme Court of the United States

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No. 84-1140

NICK MELIA, PETITIONER

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 741 F.2d 70. Earlier opinions of the court of appeals in this case are reported at 691 F.2d 672 and 655 F.2d 547.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1984 (Pet. App. A1). A petition for rehearing was denied on October 5, 1984 (Pet. App. A4-A5). The petition for a writ of certiorari was filed as of December 4, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted of knowingly receiving stolen property that had

travelled in interstate commerce, in violation of 18 U.S.C. 2315.[1] The district court sentenced petitioner to six years' imprisonment. The court of appeals affirmed (Pet. App. A1-A3).

1. The evidence adduced at trial, which is not in dispute, showed that in May 1977, in Stamford, Connecticut, petitioner received $600,000 worth of jewelry that had been stolen from a jewelry store in Wilmington, North Carolina, by co-defendants Robert Mercier, Edmund Maras, Leo Fraley, and Alfred Conti.[2] Petitioner then fenced the jewelry; the buyer paid Maras and Fraley $70,000 in cash and was to pay petitioner $5,000 for his services.

On May 15, 1977, Maras, Fraley, Mercier, and Conti burglarized a jewelry store in Wilmington. They took the store's entire inventory, which exceeded $600,000 in value, plus an undetermined amount of merchandise that was in the store for repairs (C.A. App. 48-53, 78-87, 125-129). After completing their haul, the four men drove to Conti's home

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[1]This was petitioner's fourth trial. He was indicted in March 1980 on one count of a three count indictment; the remaining counts charged several co-defendants with transporting goods stolen in two burglaries (C.A. App. 8-9). Petitioner's first trial ended in a mistrial when the jury was unable to agree on a verdict. Petitioner's second trial resulted in a conviction, but the court of appeals reversed because of improper joinder of offenses. *United States* v. *Chinchic*, 655 F.2d 547 (1981). On retrial, petitioner was again convicted, but his conviction was again reversed, this time because of several evidentiary errors. *United States* v. *Melia*, 691 F.2d 672 (1982).

[2]Maras and Mercier pleaded guilty and testified for the government at trial. Conti was convicted at petitioner's second trial, and his conviction was affirmed on appeal. *United States* v. *Conti*, 661 F.2d 927 (1981) (Table). Fraley has not been apprehended. A fifth co-defendant, Thomas Cocco, was later indicted for receiving the jewelry from petitioner. In July 1982, venue for that case was transferred to Connecticut, but the United States Attorney there declined to prosecute Cocco.

in Youngstown, Ohio, where they counted their loot and determined that its retail value was more than $600,000 (*id.* at 87-89, 129-131).

The next day, Maras and Fraley took the jewelry and drove to petitioner's home in Stamford, Connecticut (C.A. App. 131-133). Once there, they showed the jewelry to petitioner and his wife (*id.* at 133). Petitioner then contacted a prospective buyer, Thomas Cocco, who came to petitioner's house to examine the stolen jewelry (*id.* at 133-136). After completing his examination, Cocco said that much of the jewelry was of inferior quality, and he offered only $30,000 for the lot (*id.* at 136-137). After some negotiation, Maras, Fraley, and Cocco agreed on the price of $70,000 plus $5,000 for petitioner as "middleman" (*id.* at 137-138, 285-286, 288, 291). Cocco paid $30,000 in cash that day. Maras and Fraley in turn let him have the jewelry and agreed to meet with Cocco the next day for the remaining payment (*id.* at 138-139).

On May 17, petitioner accompanied Maras and Fraley to their meeting with Cocco at a hospital in Bridgeport, Connecticut. Cocco produced a bag containing $40,000 in cash, which Maras and Fraley took with them (C.A. App. 139-140). Before they left, Maras and Fraley told Cocco to pay petitioner his $5,000 fee, and Cocco assured them that he would do so (*id.* at 139-141). Maras and Fraley then returned to Youngstown, where the proceeds were divided equally among the four burglars (*id.* at 92, 140-141).

2. At the close of the government's case, petitioner moved for a judgment of acquittal on the ground that the evidence failed to establish venue in the Eastern District of North Carolina (C.A. App. 337; see also *id.* at 10-12). Petitioner relied primarily on the district court's earlier ruling transferring venue over Cocco's indictment to the District of Connecticut (*ibid.*). The district court held that

petitioner had waived his venue claim by failing to raise it at his three previous trials or prior to his fourth one (*id.* at 337). Petitioner presented no evidence in his defense and simply renewed his motion for a judgment of acquittal, which the district court again denied (*id.* at 338-339). Petitioner did not request a jury instruction on the question of venue.

3. On appeal, the court of appeals declined to hold that petitioner had waived his venue claim, on the ground that the defect was not apparent from the face of the indictment (Pet. App. A2). The court concluded, however, that venue was proper in the Eastern District of North Carolina because the offense was begun in that district, and 18 U.S.C. 3237(a) ¶ 2 permits prosecution of an offense involving interstate transportation of stolen goods in any district in or through which the goods were moved (*id.* at A2-A3). The court based its conclusion upon the specific venue provisions contained in the pre-codification statutes dealing with interstate transportation and receipt of stolen property, 18 U.S.C. (1940 ed.) 416, 418. The court of appeals also rejected petitioner's claim that such a reading of Section 3237 rendered it unconstitutional. The court held that allowing a prosecution to be brought in any district involved in a " 'process of wrongdoing' " was sanctioned by this Court's decisions recognizing that Congress has the power to create such venue provisions. Pet. App. A3, quoting *United States* v. *Johnson*, 323 U.S. 273, 276 (1944).

ARGUMENT

1. The courts of appeals have uniformly recognized that a defendant's failure to make a timely assertion of the claim of improper venue may constitute a waiver of that claim. See, *e.g.*, *United States* v. *Bustos-Guzman*, 685 F.2d 1278, 1280 (11th Cir. 1982); *United States* v. *Boney*, 572 F.2d 397, 400 (2d Cir. 1978); *Kitchen* v. *United States*, 532 F.2d 445, 446 (5th Cir. 1976); *United States* v. *John*, 518 F.2d

705, 708-709 (7th Cir. 1975); *United States* v. *Burkhart*, 501 F.2d 993, 996 (6th Cir. 1974), cert. denied, 420 U.S. 946 (1975); *United States* v. *Price*, 447 F.2d 23, 27-28 (2d Cir. 1971), cert. denied, 404 U.S. 912 (1971). Under the circumstances of this case, petitioner waived his venue claim.

Petitioner's theory is that a person may be prosecuted for the receipt of stolen property only in the district in which he received that property, even though the property may still be moving in interstate commerce from the district of its theft at the time. It should have been obvious from the indictment itself that venue would lie only in Connecticut under this theory, especially when Count 2 is read in conjunction with Count 3. Cf. *Dunbar* v. *United States*, 156 U.S. 185, 190 (1895) (counts of an indictment are to be read in their entirety and in a common sense manner); *United States* v. *Chilcote*, 724 F.2d 1498, 1504-1505 (11th Cir. 1984), cert. denied, No. 83-6624 (May 29, 1984) (same). Count 2 charged petitioner's confederates, but not petitioner, with the interstate transportation of stolen property on May 14-15, 1977, from North Carolina via Ohio to Connecticut (C.A. App. 8), while Count 3 charged petitioner with the receipt of stolen property on May 19 that "was moving as, was a part of, and constituted interstate commerce, from the State of North Carolina to the State of Ohio to the State of Connecticut * * *" (C.A. App. 8-9). The plain import of Count 3 therefore is that petitioner received the stolen jewelry in Connecticut. Accordingly, under petitioner's venue theory the indictment itself sufficiently informed him of the facts necessary to assert his venue claim prior to trial, and his failure to do so amounts to a waiver of his claim. See, *e.g.*, *United States* v. *John*, 518 F.2d at 709.

But even if the indictment did not itself enable petitioner to assert his venue claim prior to his *first* trial, the judgment below was entered at petitioner's *fourth* trial on this charge

(see page 2 note 1, *supra*). Petitioner nonetheless raised his venue claim for the first time only at the close of the government's proof in this proceeding. He did not raise that claim at any of his three previous trials or prior to the fourth, despite the fact that, after his first trial, if not beforehand, he was fully aware of the factual basis for that contention. In each of petitioner's first three trials, as in this one, the evidence clearly showed that petitioner received the stolen goods in Connecticut. While there was some evidence in those earlier trials that petitioner had previously fenced stolen goods for some of his co-defendants, the government always contended that petitioner had received the stolen jewelry charged in the indictment in Connecticut and not at any earlier point. And when petitioner finally raised his venue claim in this case, he relied (C.A. App. 10-12) chiefly on the district court's ruling in co-defendant Cocco's case that was entered fully seven months prior to the start of petitioner's fourth trial. See Gov't C.A. Br. App. 4a (district court's order in Cocco's case).

The rationale underlying the rule that, where the indictment properly alleges venue in the district of trial, a defendant may challenge the government's failure to prove that the crime actually occurred in that district once the government has concluded its case-in-chief, rests on the practical conclusion in particular cases that the defendant's venue claim became ripe only at that point. See, *e.g.*, *United States* v. *Black Cloud*, 590 F.2d 270, 272 (8th Cir. 1979).[3] While

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[3]In *Jenkins* v. *United States*, 392 F.2d 303 (10th Cir. 1968), the court of appeals permitted a defendant to raise the claim of improper venue on retrial after the jury had returned a verdict of acquittal. But that decision did not suggest that a defendant is always entitled to delay raising a venue claim until that point. As the court observed in *Jenkins*, that case involved "very unusual circumstances" (392 F.2d at 306).

The defendant was charged with burglary of a federally-insured bank in Kansas, with larceny of that bank, and with receiving and possessing stolen property. The defendant was acquitted at the retrial of actual

petitioner asserted his venue claim at that point in this trial, the unusual facts of this case render that assertion untimely. Because this was petitioner's fourth trial on this charge, he was not in the same position as a defendant who is charged under an indictment that is valid as to venue on its face and who is not fully aware of the government's proof of venue until the government has rested its case-in-chief. Rather, because petitioner had seen the government's proof on three prior occasions, he was in the same position (if not in a more favorable one) as a defendant who is charged in an indictment that is allegedly defective as to venue on its face.[4]

For that reason, petitioner should have asserted his venue claim prior to the start of his fourth trial, if not earlier, rather than at the close of the government's case-in-chief. In these circumstances, where a defendant is fully aware of the basis for a claim of improper venue, it is neither unfair nor

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participation in the theft, whereupon he claimed that the venue for the receipt charge in Kansas, was improper, because, once he was found not to have participated in the theft in Kansas, the only proof of the receipt charge showed that he had committed it, if at all, in Oklahoma. 392 F.2d at 304-306. In those unusual circumstances, the court of appeals held that the defendant had not waived his claim because it was only "when the jury acquitted him of the first two charges, [that] the issue of venue clearly arose" (392 F.2d at 306).

By contrast, in this case the government never alleged and never adduced any evidence tending to show that petitioner had done any acts in North Carolina, where the theft took place. Petitioner's venue claim thus was apparent well before he raised it at the close of the government's proof at his fourth trial. Accordingly, *Jenkins* is inapposite to this case.

[4]The court of appeals declined to rule that petitioner had waived his venue claim because, in its opinion, the defect was not obvious from the face of the indictment and petitioner was thus entitled to assert his claim at trial (Pet. App. A2). That ruling fails to take into account the unique circumstances of this case detailed in the text, which establish that there was no need to delay assertion of the venue claim until well into the fourth trial.

oppressive to require him to assert that claim at a point before trial has commenced so that, if his contention is upheld, the case may be brought in a proper venue without the needless waste, inefficiency, and uncertainty attendant upon a midtrial or postverdict dismissal on venue grounds. The contrary rule would also plainly encourage defendants to engage in precisely the type of "sandbagging" that this Court has often criticized. See, *e.g.*, *Wainwright* v. *Sykes*, 433 U.S. 72, 88-90 (1977); *Davis* v. *United States*, 411 U.S. 233, 241 (1973).[5]

2. The issue of the application of the venue provisions of the second paragraph of 18 U.S.C. 3237(a) to prosecutions under 18 U.S.C. 2315 for receipt of stolen property is one that has rarely arisen and on which there is no conflict among the circuits. In the only other case to consider the question, the Second Circuit, after canvassing the statutory history that the court of appeals relied upon in this case (Pet. App. A3), reached the same conclusion in a prosecution for the sale or disposition of stolen property under Section 2315. *United States* v. *DeKunchak*, 467 F.2d 432,

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[5]Petitioner offered no reason at trial why he delayed until the government had concluded its case-in-chief before raising this claim (see C.A. App. 10-12, 337-338). In the court of appeals, petitioner sought to excuse his delay by claiming that he could not know prior to the conclusion of the government's case-in-chief whether the government would be able to offer evidence, as it had during his first three trials, that he had an ongoing relationship with his confederates in which he had fenced stolen goods of theirs (Petitioner's C.A. Br. 34-35). But, rather than excuse his delay, petitioner's argument demonstrates that he elected to withhold his claim for tactical reasons. On appeal from the judgment of conviction entered at petitioner's third trial, the court of appeals held this evidence inadmissible under Fed. R. Evid. 404(b). *United States* v. *Melia*, 691 F.2d at 675. Petitioner was thus fully aware before his fourth trial began that there would be no evidence linking him more directly with the theft itself. Accordingly, petitioner cannot now avert the consequences of his delay in challenging venue.

437-438 (1972).[6] Because there is no difference between the sale or disposition and the receipt of stolen property for purposes of Sections 2315 and 3237(a) ¶ 2, the court of appeals' ruling in this case is fully consistent with the only other court of appeals' decision on point.

Petitioner incorrectly asserts (Pet. 8-9, 15-16) that the decision below conflicts with decisions from other circuits that venue for the crime of receiving stolen property lies only in the district of receipt. In fact, only *DeKunchak* considered the application of the second paragraph of 18 U.S.C. 3237(a) to a Section 2315 offense; as noted above, it upheld venue in a district other than the one in which the gravamen of the offense took place. 467 F.2d at 437-439. Moreover, unlike this case and *DeKunchak*, the crimes at issue in the cases petitioner cites, such as the receipt of a firearm by a convicted felon, did not involve the misuse of

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[6]As the Second Circuit explained in *DeKunchak* (467 F.2d at 437-438), 18 U.S.C. 2315 had its genesis in the National Motor Vehicle Theft (Dyer) Act, ch. 89, 41 Stat. 324 *et seq.*, and was extended to other stolen property in the National Stolen Property Act, ch. 333, 48 Stat. 794 *et seq.* That Act was codified as 18 U.S.C. (1940 ed.) 413-419. Congress also adopted a special venue provision for that offense, which permitted the government to prosecute anyone violating Section 416 "in any district from, into, or through which such [stolen] goods * * * have been transported or removed." 18 U.S.C. (1940 ed.) 418. In the 1948 recodification of the federal criminal code, Congress transferred the former 18 U.S.C. (1940 ed.) 416 to the present 18 U.S.C. 2315. While Congress eliminated the special venue provision from that portion of the criminal code, the same venue provisions, with more general application, became the second paragraph of 18 U.S.C. 3237(a). The Reviser's Notes make clear that the special venue provisions of the former Section 418 were omitted because they were " 'completely covered' " by the current Section 3237. See *DeKunchak*, 467 F.2d at 438 (citation omitted). Accordingly, the court below correctly held that 18 U.S.C. 3237(a) ¶ 2 must be read in light of the relevant history of venue provisions for the particular offense now embodied in Section 2315.

the facilities of interstate commerce to carry out the crime.[7] Accordingly, because those crimes do not implicate Congress's concern, manifested by Sections 2315 and 3237(a) ¶ 2, with preventing the use of interstate commerce in the actual commission of a crime, the definition of "receipt" used in those cases is not determinative of the question of venue for a Section 2315 prosecution.

Nor does petitioner's Sixth Amendment claim merit further review. In holding that venue was proper in the district where petitioner's trial took place, the court of appeals simply relied (Pet. App. A3) upon this Court's statement in *United States* v. *Johnson* (323 U.S. at 276) that Congress is empowered to provide for trial "in any criminal court of the United States through which a process of wrongdoing moves." Petitioner has not identified any conflict with any other court of appeals' decision on this point (see Pet. 9, 14); rather, his complaint is that the court of appeals' improperly relied upon 18 U.S.C. 3237(a) ¶ 2 in

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[7]Most of the cases on which petitioner relies involved prosecutions for offenses different from that involved here. See *United States* v. *Black Cloud*, 590 F.2d 270 (8th Cir. 1979) (receipt of firearm by convicted felon, in violation of 18 U.S.C. 922(h)(1)); *United States* v. *Wolf*, 535 F.2d 476 (8th Cir.), cert. denied, 429 U.S. 920 (1976) (same, except in violation of 18 U.S.C. App. 1202(a)); *United States* v. *Hopkins*, 529 F.2d 775 (8th Cir. 1976), cert. denied, 431 U.S. 965 (1977) (same). Only *Jenkins* and *United States* v. *Bozza*, 365 F.2d 206 (2d Cir. 1966), even mentioned the continuing offense statute. *Jenkins* merely noted it in passing (392 F.2d at 306), did not specifically refer to the second paragraph of 18 U.S.C. 3237(a), and merely said that the record did not support its application in that case — presumably because bank robbery and the related offenses in 18 U.S.C. 2113 do not have interstate transportation as an element of the offense. *Bozza* considered only the first paragraph of Section 3237(a) and made no mention of the second paragraph, on which the court below relied. 365 F.2d at 220-222. Indeed, because there was no evidence in *Bozza* that the stolen property had ever been in or moved through the district of trial, there was no occasion whatever for *Bozza* to consider the second paragraph of Section 3237(a).

his case. That factbound contention does not merit further review.[8] Petitioner has also failed to show that this issue is likely to recur with the degree of regularity necessary to warrant review by this Court. Finally, any error was harmless. See generally *United States* v. *Hasting*, 461 U.S. 499 (1983). Petitioner has never claimed that his defense was in any way impaired (for instance, by the inability to present witnesses in his defense) or that he suffered any unique personal hardship because he was tried in North Carolina, rather than in Connecticut. Reversal would thus be unwarranted even if any error occurred. Cf. *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 872 (1982) (government's deportation of defense witnesses does not deprive a defendant of a fair trial "unless there is some explanation of how their testimony would have been favorable and material"). Indeed, petitioner's failure to assert his venue claim prior to the close of the government's case-in-chief at his fourth trial clearly demonstrates that he did not believe that being tried in North Carolina by itself impaired his defense or caused him to suffer any undue hardship.

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[8] At petitioner's first three trials, the government introduced evidence that he had a continuing relationship as a "fence" for the burglars who stole the jewelry here and that he helped plan other burglaries. See *United States* v. *Melia*, 691 F.2d at 676-677 (evidence of petitioner's prior acts inadmissible under Rules 403 and 404(b)). Evidence of such a relationship would show that petitioner "caused" the interstate transportation involved here. Even at this trial, one of petitioner's cohorts testified outside the jury's presence that he and one of his colleagues had previously fenced stolen jewelry through petitioner and that petitioner's confederates had agreed amongst themselves to give petitioner the first opportunity to buy their future burglary proceeds (C.A. App. 101-115). The district court could have sustained venue in the district of trial on the basis of petitioner's activities as a "fence" for his confederates' stolen goods, even if this evidence was too prejudicial to allow before the jury in its consideration of petitioner's guilt. Because that evidence undercuts the premise for petitioner's constitutional argument, his argument necessarily fails.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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